Supreme Court, U.S.
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No. 14-9496

IN THE

Supreme Court of the United States

ELIJAH MANUEL

Petitioner,

v.

CITY OF JOLIET, ET AL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a time-barred Fourth Amendment claim, alleging that the plaintiff was arrested without probable cause, gives rise to a separate Fourth Amendment "malicious prosecution" claim against the arresting officers when prosecutors bring charges stemming from the arrest, the limitations period for which begins to run after the prosecution is concluded and the arrestee is released from custody.

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INTEREST OF THE *AMICI CURIAE*

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and the public that is dependent on their services. Amici monitor and analyze legal developments that have an impact on local governments, and take positions advocating for greater protection of government officials as they serve the public.[1]

The National Association of Counties (NACo) represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 State municipal leagues, the NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

STATEMENT OF THE CASE

The amended complaint alleges that on March 18, 2011, respondent Terrence J. Gruber, an officer of the Joliet, Illinois, Police Department, stopped petitioner's vehicle, forcibly removed petitioner from the front passenger's seat of the vehicle, placed him under arrest, pushed him to the ground injuring petitioner's back, head, and hand, all without probable cause to support a lawful arrest, and employing excessive force. J.A. 62-63.[2] Officer Gruber then performed a search of petitioner's person, finding a bottle of vitamins. J.A. 63-64. Another officer performed a field test on the on the pills within the bottle, which indicated that they did not contain a controlled substance, but Officer Gruber placed petitioner under arrest despite the negative test result. J.A. 69-70.

Petitioner was transported to a police facility, where another respondent, Sergeant Scott Cammack, again

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[2] Because this case is before the Court on the sufficiency of petitioner's first amended complaint, we take all nonconclusory factual allegations in that pleading as true. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677-80 (2009).

tested the pills. J.A. 70. Petitioner "is informed and believes that the test results showed that that the pills were not a controlled substance." *Id.* Nevertheless, Officer Gruber, Sgt. Cammack, and the other respondent officers involved in petitioner's arrest "caused false criminal charges to be brought against p[etitioner] for possession of a controlled substance, with intent to deliver." J.A. 71. That day, Officer Jeffrey Kneller, also a respondent, executed under oath a complaint charging petitioner with possession of a controlled substance. J.A. 52-53.

The records of the Circuit Court of Will County, Illinois, indicate that on the day of his arrest, petitioner appeared before a judge on the drug charge, counsel was appointed to represent him, the judge found that the charge was supported by probable cause, set bond, and remanded petitioner to the custody of the county jail. Pet. Br. 4-5.

On March 30, Officer Gruber testified before the Will County Grand Jury that during the traffic stop, after detecting the odor of cannabis, he arrested petitioner and, during a search incident to arrest, recovered pills that, according to a field test, contained methylenedioxymethampheamine, or ecstasy, a controlled substance. J.A. 96. Based on that testimony, the grand jury returned an indictment charging petitioner with unlawful possession of a controlled substance. J.A. 54-55.

The Illinois state crime laboratory tested the pills recovered from petitioner and, in a report dated April 1, 2011, found that they did not contain a controlled substance. J.A. 51. On May 4, the prosecution's motion to dismiss the charge against petitioner was granted, and he was released from custody the next day. J.A. 34, 101.

On April 10, 2013, petitioner brought suit against the City of Joliet and the officials involved in his arrest, alleging a violation of his constitutional rights actionable under 42 U.S.C. § 1983. J.A. 102. The district court dismissed the action on the ground that petitioner's action was barred by the applicable statute of limitations because it had not been brought within two years of his allegedly unconstitutional arrest. J.A. 98-99.

The court of appeals affirmed, concluding that although petitioner had tried to avoid the limitations bar by styling his action as a "malicious-prosecution claim," J.A. 102, "there is nothing but confusion gained by calling [a] legal theory [brought under the Fourth Amendment or any other amendment] 'malicious prosecution.'" J.A. 103 (quoting *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009) (brackets in original)). It agreed with the district court that "any Fourth Amendment claim that Manuel might bring is time-barred." *Id.*

SUMMARY OF THE ARGUMENT

Petitioner's claim that the officers involved in his arrest violated his Fourth Amendment rights is barred by the applicable two-year statute of limitations.

The Fourth Amendment is violated when an allegedly unconstitutional search or seizure occurs, not when an ensuing criminal case is resolved. The statute of limitations on a Fourth Amendment false-arrest claim begins to run when the arrestee appears in court, leaving the custody of the arresting officers. At that point, one arrested without probable has a right to sue for an allegedly unconstitutional arrest, regardless whether he is later prosecuted as a consequence of the arrest.

Although petitioner characterizes the criminal case against him as a "malicious prosecution," the Fourth Amendment forbids unreasonable searches and seizures, rather than unwarranted or malicious prosecutions. Petitioner's submission, moreover, would permit plaintiffs to bring decades-old Fourth Amendment claims when they finally emerge from prison. In our experience, petitioner's submission would give life to an enormous volume of stale claims, undermining critical policies basic to section 1983's embrace of state statutes of limitation.

Equally important, section 1983 permits petitioner to sue for a violation of his constitutional rights, not for common-law torts such as malicious prosecution. Indeed, the tort of malicious prosecution developed so that private parties could be held accountable for wrongful prosecutions they pressed against others in pursuit of private interests. These considerations have no fair application to the liability of public prosecutors and police, who are politically accountable for wrongful prosecutions.

Accordingly, petitioner's Fourth Amendment claim accrued when he left the arresting officers' custody and appeared in court. This action is therefore time-barred.

ARGUMENT

Petitioner's amended complaint states that his "action arises under the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. § 1983)." J.A. 59. In this Court, petitioner presses only what he calls a "malicious prosecution claim[] for pretrial detention under the Fourth Amendment." Pet. Br. 10.

Section 1983 makes actionable "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (2012). Accordingly, "[t]he first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

By alleging that his arrest was unsupported by probable cause, petitioner's complaint describes a violation of the Fourth Amendment, actionable under section 1983. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004). *Cf. Malley v. Briggs*, 475 U.S. 335, 345 (1986) (officer can be liable for obtaining arrest warrant unsupported by probable cause). That claim accrued, however, when petitioner left the custody of the arresting officers. The statute of limitations on section 1983 claims in Illinois is the two-year period for actions on a personal injury. *See, e.g.*, *Ashafa v. City of Chicago*, 146 F.3d 459, 461-63 (7th Cir. 1998). This time bar is fatal to petitioner's case.

I. A TIME-BARRED A FOURTH AMENDMENT CLAIM CANNOT BE REVIVED BY RELABELING IT AS A CLAIM FOR MALICIOUS PROSECUTION.

Since petitioner alleged no violation of his Fourth Amendment rights beyond a time-barred claim for arrest without probable cause, his action was properly dismissed.

A. A Fourth Amendment Claim Alleging an Arrest Without Probable Cause Accrues When the Arrestee Appears in Court.

Petitioner's Fourth Amendment claim against the respondent officers accrued when they arrested him, allegedly without probable cause, and is barred by the two-year statute of limitations.

A section 1983 claim accrues, and the limitations period begins to run, "'when the plaintiff has a 'complete and present cause of action,' that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 201 (1997) (citations and further internal quotations omitted)). *Accord, e.g.*, *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016).

When an individual is arrested without probable cause, his Fourth Amendment rights are violated, and he accrues a right to sue. After all, "[t]he wrong condemned by the Fourth Amendment is 'fully accomplished' by the unlawful search or seizure itself" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). *Accord, e.g., Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998); *Arizona v. Evans*, 514 U.S. 1, 10 (1995).[3]

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[3] Moreover, because accrual turns on when the plaintiff acquired a right to relief under the Constitution or laws of the United States, "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 388.

It matters not whether an arrestee subsequently faces criminal charges as a result of an arrest, accompanied by pretrial detention, or that the arresting officers allegedly provided false information about the arrest to prosecutors. The Fourth Amendment is violated by "unreasonable searches and seizures," U.S. Const. amend. IV, not information that police provide to prosecutors, or a charging document that prosecutors thereafter choose to file.

To be sure, an ensuing prosecution may well be a continuing adverse consequence of an arrest in violation of the Fourth Amendment for which an arrestee can recover damages—a question we consider in Part II.C below—but the fact that a plaintiff continues to experience adverse consequences flowing from an unlawful act does not delay the running of the limitations period. Were the rule otherwise, the statute of limitations would never run on the claims of plaintiffs seeking to recover for a permanent disability caused by the defendant's unlawful conduct, since their damages would continue to mount. *Cf. Chardon v. Fernandez*, 454 U.S. 6 (1981) (per curiam) (section 1983 action alleging retaliatory discharge accrued when plaintiffs received notice of discharge and not when discharge took effect).

Wallace illustrates our point. Wallace brought a section 1983 action based on an allegedly unconstitutional arrest, and contended that his claim did not accrue until he was released from custody following the dismissal of the charges against him "since he is seeking damages up to that time." 549 U.S. at 391. This Court disagreed: "Even assuming that all damages for detention pursuant to legal process could be regarded as consequential damages attributable to the unlawful arrest, that would not alter the

commencement of the statute of limitations." *Id.* That is because a claim "accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages." *Id.* (quoting 1 Calvin W Corman, Limitation of Actions § 112, at 150 (2005)).

The Court observed that Wallace "was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time." 549 U.S. at 390 n.3. The Court added that Wallace had alleged what would have been regarded at common law as the tort of false imprisonment, which "is subject to a distinctive rule – dictated, perhaps, by the reality that the victim may not be able to sue while he is still imprisoned." 549 U.S. at 389. Under that rule, a claim accrues "once the victim becomes held pursuant to [legal] process – when, for example, he is bound over by a magistrate or arraigned on charges." *Id.* (citations and emphasis omitted). In *Wallace*, that occurred "when [Wallace] appeared before the examining magistrate and was bound over for trial." *Id.* at 391. This proved fatal: "Since more than two years elapsed between that date and the filing of this suit the action was time barred." *Id.* at 391-92.[4]

Petitioner endeavors to put *Wallace* aside on the ground that it did not "explore[] the contours of a Fourth Amendment malicious prosecution suit under § 1983 " Pet. Br. 29 (quoting *Wallace*, 549 U.S. at

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[4] As *Wallace* recognized, this accrual rule may result in the commencement of civil litigation while the criminal case is pending or anticipated, but in such cases, rather than somehow manipulating the rules for accrual, if necessary, the district court could "stay the civil action until the criminal case or the likelihood of a criminal case is ended." 549 U.S. at 394.

390 n.2). Malicious prosecution, however, is a state-law tort, not a Fourth Amendment claim.

The Fourth Amendment forbids not unwarranted or malicious prosecutions but unreasonable searches and seizures. Indeed, the tort of malicious prosecution does not even include among its elements a requirement that the plaintiff be subjected to search or seizure. *See* Restatement (Second) of Torts § 653 (1977). *See also* U.S. Br. 24 n.15 ("[A] common law claim of malicious prosecution does not have seizure as an element – a necessary component of a Fourth Amendment claim.").

Accordingly, rebranding a time-barred Fourth Amendment claim as "malicious prosecution" changes nothing of substance. There is no malicious-prosecution clause lurking in the Fourth Amendment. The invocation of a state-law tort theory is simply irrelevant to a section 1983 Fourth Amendment action. *Cf. Rehberg v. Paulk*, 132 S. Ct. 1497, 1504 (2012) ("[T]he Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common law claims, an all-in-one federal claim encompassing the torts of malicious prosecution, and more.").

Petitioner's allegation that he was arrested and subsequently detained at a police facility through the course of an evening without probable cause describes a false imprisonment in violation of his right to be free from unreasonable search and seizure under the Fourth Amendment. That Fourth Amendment violation was complete as soon as the allegedly unconstitutional arrest, and its attendant infringement on petitioner's liberty, occurred. As *Wallace* holds, as soon as petitioner left the arresting officers' custody and appeared in court, where he faced a formal charge and

was detained pursuant to the court's bail determination, the statute of limitations began to run.[5]

Petitioner failed to bring suit within two years of the time that he left the custody of the arresting officers and appeared in court. Therefore, petitioner's Fourth Amendment claim is now time-barred.

B. Judicially-Authorized Pretrial Detention Following an Arrest Is Not a Continuing Seizure by the Arresting Officers.

Petitioner argues that he has alleged a Fourth Amendment violation that lasted until he was released from custody, arguing that "anyone who is arrested and put in jail is seized from arrest until release " Pet Br. 22.[6]

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[5] Petitioner makes no argument that any doctrine tolled the running of the statute of limitations while the charge against him was pending. *Wallace*, moreover, concluded that no such tolling doctrine exists. *See* 549 U.S. at 394-97. And, though the allegation is unquestionably disturbing, petitioner makes no argument that his claim that excessive force was used during his arrest is timely even under his theory of "malicious prosecution."

[6] This suggestion admittedly receives some support from Justice Ginsburg's separate opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), in which she opined that a person may be considered "seized" for Fourth Amendment purposes "so long as he is bound to appear in court and answer the state's charges." *Id.* at 279 (concurring opinion). In that case, however, although the petitioner alleged a prosecution unsupported by probable cause, he pressed only a due process and no Fourth Amendment claim, as both the lead opinion and Justice Ginsburg recognized. *See id.* at 271 (plurality opinion); *id.* at 277 & n.1 (Ginsburg, J. concurring). Accordingly, the parties did not brief, and the Court had no occasion to decide, whether Albright had a Fourth Amendment claim not barred by the applicable statute of limitations. Indeed, although Albright filed suit within two years

Wallace is a complete answer to petitioner's argument. As we explain above, in that case, this Court held that Wallace's claim accrued when he first appeared in court, not when he was released from custody. Even aside from the precedential force of *Wallace*, however, petitioner's argument is unavailing, for at least three reasons.

1. A Fourth Amendment Seizure Does Not Continue Throughout Pretrial Detention.

Petitioner's conception of a Fourth Amendment "seizure" continuing throughout pretrial detention is insupportable.

A "seizure" of a person, for purposes of the Fourth Amendment, involves the process of acquiring custody of an individual, not court-ordered pretrial detention of one previously taken into custody. *See, e.g.*, *Brendlin v. California*, 551 U.S. 249, 254 (2007) ("A person is seized by the police when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement" (emphasis, internal quotations and citations omitted)); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) ("From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.' To constitute an arrest, however – the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence – the mere grasping or application

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after the charges against him were dismissed, he sued more than two years after he had been arrested; and, for that reason, the plurality observed that he "may have missed the [applicable two-year] statute of limitations for any claim he had based on an unconstitutional search or seizure." *Id.* at 271 n.5.

of physical force with lawful authority was sufficient.").

Judicially-authorized pretrial detention, in contrast, has always been assessed under the Due Process Clause. *See, e.g.*, *Kingsley v. Henrickson*, 135 S. Ct. 2466, 2473-76 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979). Indeed, if pretrial detention were "a seizure subject to the reasonableness requirement of the Fourth Amendment," *Tennessee v. Garner*, 471 U.S. 1, 7 (1985), there would be no need for the Eighth Amendment's Bail Clause and its admonition that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII, cl.1.

On this point, petitioner relies primarily on *Gerstein v. Pugh*, 420 U.S. 103 (1975), as do his amici, *e.g.*, U.S. Br. 11-12; Alschuler Br. 30; NACDL Br. 13, 27 *Gerstein*, however, held only that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114. In this fashion, *Gerstein* identified a Fourth Amendment *prerequisite* to pretrial detention; it did not hold that the entire period of pretrial detention is a "seizure" within the meaning of that amendment.

Petitioner was searched and seized, allegedly unreasonably, when he was arrested. His Fourth Amendment claim accrued then.

2. An Arresting Officer's Seizure Ends When the Arrestee Appears in Court.

Even if pretrial detention is properly regarded as an ongoing seizure, that would have no effect on the point at which petitioner's claim against the arresting officers accrued. Their seizure of petitioner ended when he left their custody.

Under Illinois law, an arrestee must be brought to court "without unnecessary delay . and a charge shall be filed." 725 ILCS 5/109-1(a) (2014). At the initial appearance in court, the judge must admit the arrestee to bail as provided by applicable law. *Id.* § 109-1(b)(4). Accordingly, after an arrestee appears in court, his custodial status is determined by the court, not the arresting officers. Thus, once petitioner appeared in court and received a bail hearing, he was no longer in respondents' custody, and their seizure of him was at an end.

It therefore is quite wrong to say that respondents somehow seized petitioner throughout the course of his prosecution.

3. A Claim Accrues When a Defendant's Overt Act Injures a Plaintiff.

Even if respondents undertook some sort of ongoing seizure throughout the time that petitioner was in custody, that would not delay accrual of petitioner's Fourth Amendment claim.

Statutes of limitation "characteristically embody a 'policy of repose, designed to protect defendants.'" *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Burnet v. New York Central R. Co.*, 380 U.S. 424, 428 (1965)). It follows that conduct occurring outside the limitations period is "treat[ed] as lawful" once a litigant "fail[s] to file a timely charge " *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

Accordingly, a plaintiff may not bring suit based on a defendant's overt act that caused him injury outside the limitations period, even if the defendant committed additional unlawful acts within the limitations period. *See, e.g.*, *Klehr v. A.O. Smith Co.*, 521 U.S. 179,

189 (1997) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."); *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980) ("[T]he commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.").

It is only when the defendant's conduct is illegal because it involves an ongoing pattern of misconduct extending into the limitations period that an alleged continuing violation delays accrual. *See, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) ("A hostile work environment claim is composed of a series of separate acts Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered "); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) ("[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." (footnote omitted)).

Petitioner alleged no pattern of misconduct extending into the limitations period. To the contrary, the arresting officers searched and seized petitioner on a single occasion, and, under *Wallace*, an attack on that arrest is now time-barred. Even if the arresting officers later provided false information to prosecutors

about petitioner's arrest, that would not have produced a fresh search or seizure in violation of the Fourth Amendment.[7]

In fact, the only conduct of any respondent alleged in the complaint and occurring after petitioner's arrest and appearance in court is Officer Gruber's testimony before the grand jury. That testimony, however, occurred outside the limitations period. It was also protected by the immunity from civil liability enjoyed by grand jury witnesses. *See Rehberg*, 132 S. Ct. at 1506-07 (holding that allegedly false grand jury testimony and activities "preparatory" to testimony are immunized).

Petitioner surely cannot extend the limitations period through the strange alchemy of combining a time-barred false-arrest claim with time-barred and immunized grand jury testimony. *Cf. Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 908 (1989) ("[P]etitioners have asserted a claim that is wholly dependent on discriminatory conduct occurring well outside the period of limitations, and cannot complain of a continuing violation.").

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[7] This point discloses the problem with the position of the United States, which concedes that "the district court correctly dismissed as time-barred petitioner's allegations concerning his warrantless arrest," but nevertheless argues that petitioner's "claim for unlawful pretrial detention was timely, however, because it did not accrue until after the drug charge was dismissed " U.S. Br. 19 n.10. This submission improperly splits a single Fourth Amendment claim into two. The arresting officers allegedly conducted an unreasonable search and seizure of petitioner only once, outside the limitations period.

Petitioner's complaint alleged a discrete Fourth Amendment violation outside the limitations period. It is time-barred.

C. Powerful Policy Considerations Support a Rule of Prompt Accrual for Fourth Amendment Claims.

Our concern with the limitations period applicable to Fourth Amendment claims is rooted in our experience with these claims. Petitioner's submission would make it enormously difficult for local governments and their employees to have a fair chance to defend the claims that petitioner's submission makes viable.

Although, in his opening brief, petitioner never expressly takes a position on when his claim accrued, in the lower courts, he argued that he "filed his complaint within two years of the dismissal of the drug charge, so his malicious prosecution claim was timely." Pet. Br. 9. Perhaps petitioner's argument that "anyone who is arrested and put in jail is seized from arrest until release," *id.* at 22, means the Fourth Amendment claim he presses is available only to those who have been subject to pretrial detention. But, some amici go further, arguing that even those released prior to trial remain "seized" in some sense, and acquire the right to sue when they are no longer required to appear in court. *See* NACDL Br. 24-27.

Petitioner's submission also implies that even defendants who are convicted and sentenced to prison can bring Fourth Amendment claims upon release. After all, if a Fourth Amendment seizure continues as long as an individual is in custody, a "seizure" would presumably extend to post-conviction incarceration no less than pretrial detention. Some amici are explicit on this point, arguing that individuals who have been

convicted acquire the right to sue years later, when they are finally released. *See* Innocence Network Br. 27-30.

Moreover, the conception of a Fourth Amendment claim accruing upon release from custody suggests that even convicts who are never exonerated can emerge from prison and file decades-old Fourth Amendment claims. Although petitioner notes that "[m]alicious prosecution claims accrue when 'criminal proceedings have terminated in the plaintiff's favor,'" Pet. Br. 9 (quoting *Heck v. Humphrey*, 512 U.S. 477, 489 (1994)), it is far from clear that this favorable-termination rule is consistent with Fourth Amendment jurisprudence. It has long been settled that the Fourth Amendment's "protection against unreasonable searches and seizures extends to the innocent and guilty alike." *McDonald v. United States*, 335 U.S. 451, 453 (1948).

In *Heck*, for example, while holding that section 1983 plaintiffs may not bring suit when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," 512 U.S. at 487, the Court added that a Fourth Amendment claim "may lie even if the challenged search produced evidence that was introduced in the state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." *Id.* at 487 n.7

Beyond that, under petitioner's submission, section 1983 plaintiffs could presumably bring Fourth Amendment claims never litigated in the antecedent criminal case. Section 1983 contains no rule barring plaintiffs from bringing Fourth Amendment claims merely because they could have been made in an antecedent criminal prosecution, even if the plaintiff chose to

plead guilty in the prior criminal case. *See Haring v. Prosise*, 462 U.S. 306, 317-23 (1983).

Accordingly, the submissions of petitioner and his amici enable section 1983 plaintiffs to bring new Fourth Amendment claims many years after an allegedly wrongful search or seizure. *See, e.g.*, Alschuler Br. 9 (acknowledging pretrial detention can "be long" and detention after trial "is likely to be long"). Wallace, for example, was in custody for over nine years before he was released and then brought suit. *See* 549 U.S. at 386-87.

The delays that these submissions contemplate will make it enormously difficult to defend litigation. In our experience, jurors frequently credit plaintiffs' testimony that they remember their arrests vividly, but because arrests are a routine business for many officers, years later they often have no independent recollection of the events. Worse still, after long delays, officers often have retired, moved, or even passed away, and independent witnesses or physical and documentary evidence that could corroborate them often cannot be located.

It is the unfairness inherent in litigating stale claims that is central to statutes of limitation, which "are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabrelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Order of Railway Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). The position advanced by petitioner and his amici, however, is utterly at odds with the purpose of the section 1983's use of state-law limitations periods, which are employed because "[j]ust determinations of

fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

A person who believes he was arrested without probable cause has ample reason to press that claim as soon as the arrest occurs. Petitioner's submission, however, tolerates lengthy delays that could be enormously prejudicial. Unless defendants are given prompt notice, they may be unaware of the need to undertake an investigation and preserve evidence.

Petitioner's rule would be costly as well, forcing law-enforcement agencies to preserve evidence for decades, at taxpayers' expense, in case a Fourth Amendment claim someday emerges. Even then, faded memories will often necessitate handsome settlements.

Worse still, the truth-seeking process is prejudiced when litigation is premised on stale evidence. That is reason enough to reject petitioner's Fourth Amendment theory of "malicious prosecution."

II. A FOURTH AMENDMENT CLAIM IS NOT PROPERLY CHARACTERIZED AS AN ACTION FOR MALICIOUS PROSECUTION.

Petitioner argues that "[p]ermitting Fourth Amendment claims such as Manuel's to proceed would uphold the longstanding principle that victims of malicious prosecution are entitled to a damages remedy." Pet. Br 36. Some of his amici similarly invoke the common-law tort of malicious prosecution. *E.g.*, Alschuler Br. 10-14. Others, however, admit the difficulties in comparing a Fourth Amendment claim with this tort. *E.g.*, U.S. Br 24 n.15 (acknowledging that the two claims "are not a perfect fit").

Analogies between section 1983 and common-law tort claims are often perilous. As this Court has observed, "§ 1983 differs in important ways from pre-existing torts." *Rehberg*, 132 S. Ct. at 1504. Indeed, section 1983 "ha[s] no precise counterpart in state law"; and, therefore, "[i]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson*, 471 U.S. at 272 (internal quotations and citation omitted).

Still, the common law can be instructive in section 1983 litigation because "'Congress intended [§ 1983] to be construed in the light of common-law principles,'" *Rehberg*, 132 S. Ct. at 1502 (second brackets in original) (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

For example, in *Heck*, invoking "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," 512 U.S. at 486, the Court held that when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence the complaint must be dismissed," *id.* at 487, reasoning that "[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because it permits damages for confinement imposed pursuant to legal process." *Id.* at 484. The Court therefore held that "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Id.* at 489-90 (footnote omitted).[8]

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[8] This holding does petitioner no good because he was never convicted. *Heck* does not delay accrual of claims prior to the point

Wallace, however, makes clear that a plaintiff cannot avoid the statute of limitations on a false-arrest claim merely by seeking damages for ensuing confinement pursuant to legal process. As we explain in Part I.A above, Wallace sought such damages, yet this Court held that his claim accrued when left the arresting officers' custody, not when he was released. If Wallace could extend the limitations period by seeking damages for confinement pursuant to legal process, the Court explained, "the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the hands of the party seeking relief." 549 U.S. at 391.

That holding forecloses petitioner's effort to delay accrual by announcing that he is interested in damages incurred while in custody pursuant to legal process. Petitioner's claim that he was arrested without probable cause accrued when he appeared in court, regardless of the damages he seeks as a consequence of that arrest.

Even aside from *Wallace*, petitioner's reliance on the common law of malicious prosecution is unavailing because of the manifold differences between Fourth Amendment and malicious-prosecution claims.

The Restatement of Torts identifies the elements of the tort of malicious prosecution:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:

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at which a criminal-defendant-turned-section-1983-plaintiff has been convicted. *See Wallace*, 549 U.S. at 392-94.

> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

Restatement (Second) of Torts § 653 (1977). These elements have changed little since the enactment of section 1983; in that era as well, malicious prosecution required proof that the defendant instituted a prosecution maliciously and without probable cause, which was terminated favorably to the accused. *See, e.g.*, Joel Prentiss Bishop, Commentaries on the Non-Contract Law §§ 221-26 (1889); 1 Francis Hilliard, The Law of Torts 416-18, 428-58 (3d ed. rev. 1866); John Townshend, A Treatise on the Wrong Called Slander and Libel §§ 420-21 ((3d ed. 1877).

As we now explain, petitioner's claim fundamentally differs from the common-law tort of malicious prosecution.

A. Fourth Amendment Claims Differ Fundamentally from a Claim for Malicious Prosecution.

The most obvious difference between a Fourth Amendment claim and malicious prosecution, as we explain above, is that malicious prosecution does not require, as one of its elements, that the plaintiff have been searched or seized. That alone should make it clear that the common law of malicious prosecution offers little useful guidance here. Beyond that, there are additional and quite fundamental differences between malicious prosecution and Fourth Amendment claims.

1. Fourth Amendment Claims Do Not Turn on the Outcome of an Antecedent Case.

Unlike malicious-prosecution claims, Fourth Amendment claims do not require a favorable outcome in antecedent litigation.

As we explain above, one element of malicious prosecution is that the antecedent prosecution terminated favorably to the criminal-defendant-turned-civil-plaintiff. A Fourth Amendment claim, in contrast, is not dependent on the outcome of an antecedent criminal prosecution. Instead, "[t]he wrong condemned by the Fourth Amendment is fully accomplished by the unlawful search or seizure itself " *Leon*, 468 U.S. at 906 (internal quotation and citation omitted).

Thus, persons victimized by unreasonable search and seizure but never criminally charged can bring Fourth Amendment claims under section 1983 without need to resort to state-court litigation. *See, e.g.*, *Monroe v. Pape*, 365 U.S. 167, 169-87 (1961), *overruled in part on other grounds by Monell v. Department of Social Services of N.Y.*, 436 U.S. 658 (1978).

Conversely, even those who are convicted on the basis of evidence obtained through an allegedly unreasonable search or seizure can bring suit despite the conviction. In *Heck*, for example, as we explain in Part I.C above, the Court wrote that "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." 512 U.S. at 487 n.7.

Moreover, even those who plead guilty can sue to seek redress for an allegedly unreasonable search or seizure, even if it was the basis for the charge to which the guilty plea was entered in state court, as long as applicable state law does not treat the guilty plea as precluding subsequent civil litigation. *See Haring*, 462 U.S. at 317-23. Indeed, in that case, the Court rejected a rule that would have required a section 1983 plaintiff to "prevail in state court 'in order to [preserve] the mere possibility" of later bringing a § 1983 claim in federal court.'" *Id.* at 322 (quoting *Brown v. Felson*, 442 U.S. 127, 135 (1979) (brackets in original)).

As *Wallace* explains, one, like petitioner, allegedly arrested without probable cause, can bring a Fourth Amendment claim immediately upon arrest, without need to await the outcome of related criminal litigation. *See* 549 U.S. at 391, 397 Accordingly, the Fourth Amendment claim petitioner advances fundamentally differs from a malicious-prosecution claim, which requires proof of a favorable outcome in an antecedent prosecution.

2. The Fourth Amendment Does Not Address the Decision to Prosecute.

Although the tort of malicious prosecution imposes a requirement of probable cause to prosecute, the Fourth Amendment does not address the decision to prosecute.

As we explain above, the Fourth Amendment addresses unreasonable searches and seizures," not unwarranted or malicious prosecutions. Not only is the legal wrong addressed by the Fourth Amendment fully accomplished by the unreasonable search or seizure itself, but even the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth

Amendment wrong.'" *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354 (brackets in original)).

Thus, the Fourth Amendment does not address the decision to prosecute; indeed, in *Gerstein*, the Court rejected the view that the Fourth Amendment entitles "the accused to judicial oversight or review of the decision to prosecute." *Id.* at 119. *See also Albright v. Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) ("The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard.") (citations omitted).

A Fourth Amendment claim is properly directed at a search or seizure, not the decision to prosecute. Petitioner's reliance on that tort is unavailing.

3. Fourth Amendment Claims Do Not Turn on Proof of Malice.

Although the common-law tort of malicious prosecution required proof of malice, a Fourth Amendment claim does not.

As we explain above, in addition to the absence of probable cause, a malicious prosecution claim requires proof of malice; that is, bringing the case "primarily for a purpose other than that of bringing an offender to justice " Restatement (Second) of Torts § 653(a) (1977). Leading commentators in the era of section 1983's enactment, while acknowledging that malice may be inferred from an absence of probable cause, nevertheless stressed that malice was an independent element of the tort requiring a separate finding of improper motive. *See, e.g.*, Melville M. Bigelow, Leading Cases on the Law of Torts 203-04 (1875); Bishop, *supra* §§ 231-35; Thomas M. Cooley, A

Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 185 (1880); Hilliard, *supra* at 446-48; Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process 236-49 (1892).

Fourth Amendment claims, in contrast, are judged by an objective test in which the motive of the investigator is irrelevant. *See, e.g.*, *Kentucky v. King*, 563 U.S. 452, 463-64 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006).

To be sure, as petitioner notes, to invalidate a search warrant, there must be proof of material misstatements or omissions made at least recklessly. Pet. Br. 17-18 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). This case, however, involves no effort to invalidate a warrant, and even a recklessness standard stops well short of the common-law requirement of malice. *Cf.* NACDL Br. 22 ("[N]othing in the text of the Constitution or § 1983 warrants importing a subjective inquiry into malice that is foreign to Fourth Amendment analysis." (footnote omitted)).

Thus, petitioner's Fourth Amendment claim does not require proof of malice. For that reason, it fundamentally differs from a common-law claim of malicious prosecution.

B. An Arresting Officer Is Not Akin to a Complaining Witness Amenable to Suit at Common Law for Malicious Prosecution.

A police officer making an arrest is not fairly analogous to a private party amenable at common law to liability for malicious prosecution.

The Restatement of Torts, as we note above, explains that liability for malicious prosecution can be imposed on "[a] *private* person who initiates or procures the institution of criminal proceedings against another." Restatement (Second) of Torts § 653 (1977) (emphasis supplied). Similarly, at the time of section 1983's enactment, "'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution " *Rehberg*, 132 S. Ct. at 1503 (quoting *Malley*, 475 U.S. at 340). Moreover, "the term 'complaining witness' was used to refer to a party who procured an arrest and initiated a criminal prosecution." *Id.* at 1507 (citation omitted).

It is no accident that the Restatement of Torts refers only to the liability of private parties for malicious prosecution. When the common-law tort of malicious prosecution developed, nothing resembling modern police departments with investigative responsibilities existed.

In England, until roughly the time of the American Revolution, the only public official engaged in law enforcement was the constable, an official charged with executing warrants and who appointed beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night. *See* Elaine A. Reynolds, Before the Bobbies: The Night Watch and Police Reform in Metropolitan London, 1720-1830, at 7-44 (1998). This system emerged in the colonies and remained in place in the framing era, with the duties of public officials engaged in law enforcement largely confined to the execution of warrants and responding to breaches of the peace. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 28-29, 68 (1993).

Not until the mid-nineteenth century did large cities begin establishing police forces. *See, e.g.*, David R. Johnson, Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887, at 12-40 (1979); Thomas A. Repetto, The Blue Parade 2-23 (1978); James F. Richardson, Urban Police in the United States 6-15, 19-32 (1974). Even so, by the time of the Civil Rights Act, policing was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more." Friedman, *supra* at 149.

Public prosecutors were also a rarity in this period. Prosecution by private parties was the predominant method at common law and was only gradually displaced by public prosecution during the nineteenth century. *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 Encyclopedia of Crime and Justice 1286 (Sanford H. Kadish et al. eds., 1983).

Nevertheless, "because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Leg. Hist. 43, 43 (1995) (footnote omitted). Thus, "when § 1983 was enacted there was generally no such thing as the modern public prosecutor." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). Instead, "it was common for criminal cases to be prosecuted by private parties." *Rehberg*, 132 S. Ct. at 1503.

It should therefore be unsurprising that virtually all of the cases describing the tort of malicious prosecution prior to 1871 considered the liability of private

individuals for initiating a prosecution rather than the potential liability of public officials such as prosecutors or investigators. *See, e.g.*, Herbert Stephen, The Law Relating to Actions for Malicious Prosecution 16-25 (Horace M. Rumsey ed. 1889); Townshend, *supra* at 432.

In the contemporary criminal justice system, in contrast, "it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury " *Rehberg*, 132 S. Ct. at 1508.[9] Prosecutors, in turn, are immune from damages liability "when initiating a prosecution " *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976).

The common-law concept of a complaining witness legally responsible for the institution of a prosecution made sense in a system of private prosecution; without tort liability, private parties would not be accountable for wrongful prosecutions they bring against others, potentially to advance their pecuniary or other personal interests. That rationale, however, has little application to the contemporary system of public prosecution.

Police officers are public officials with investigative, not prosecutorial responsibilities. Moreover, in contrast to private parties with an incentive to maximize profits or otherwise pursue their own interests, "government employees typically act within a *different* system." *Richardson v. McKnight*, 521 U.S. 399, 410 (1997).

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[9] That is the case under Illinois law. It is the responsibility of the State's Attorney, not the police, to prosecute violations of state law. *See* 55 ILCS 5/3-9005(a)(1) (2014). It is also the responsibility of the State's Attorney to present evidence to the grand jury. *See* 725 ILCS 5/112-4 (2014).

In particular, unlike private parties, police officers, the departments that employ them, and the public prosecutors who utilize them as witnesses, are subject to political accountability for wrongful prosecutions: "There is no conviction-of-the innocent lobby in our politics; police and prosecutors who prosecute or convict the innocent face political accountability once an exoneration occurs." Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 Chi.-Kent L. Rev. 127, 155 (2010) (footnote omitted). Thus, arresting officers are not fairly analogous to complaining witnesses at common law. *Cf. Rehberg*, 132 S. Ct. at 1507 ("[A] law enforcement officer who testifies before a grand jury is not at all comparable to a 'complaining witness.'").

Officers who make arrests without probable cause are properly held liable under the Fourth Amendment, if they are timely sued. Using section 1983 to treat police as the common law treated private individuals who acted as complaining witnesses, however, is not a faithful application of common-law principles.

C. Damages Attributable to a Criminal Prosecution Are Not Available on a Fourth Amendment Claim.

Although malicious prosecution "permits damages for confinement imposed pursuant to legal process," *Heck*, 512 U.S. at 484, it is far from clear that the same rule applies to a Fourth Amendment claim. Because the Fourth Amendment addresses search and seizure, not unwarranted prosecutions, damages associated with decisions to press charges are not recoverable under section 1983.

As the Court has explained, "the elements and prerequisites for recovery of damages appropriate to

compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Carey v. Piphus*, 435 U.S. 247, 264-65 (1977). Instead, recoverable damages are to be determined "with reference to the nature of the interests protected by the particular constitutional right in question." *Id.* at 265.

As its text makes plain, the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his person or property." *Horton v. California*, 496 U.S. 128, 133 (1990). *Accord, e.g., Soldal v. Cook County*, 506 U.S. 56, 66 (1992). The decision of a prosecutor to bring charges against an arrestee, however, does not enable arresting officers to further invade the arrestee's privacy or liberty. Instead, it initiates litigation that facilitates an authoritative determination of the defendant's Fourth Amendment rights.

In *Gerstein*, as we note above, the Court rejected the view that the Fourth Amendment entitles "the accused to judicial oversight or review of the decision to prosecute." 420 U.S. at 119. Thus, as Judge Posner put it, Fourth Amendment damages do not include those attributable to prosecution because "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003), *overruled in part on other grounds by Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom. Wallace v. Kato*, 549 U.S. 384 (2007).

Other constitutional requirements protect an accused against unwarranted charges, such as the right to counsel, which attaches at an arrestee's initial appearance in court, *see Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008), and the rights to a speedy, public, and fair trial, before an impartial jury. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-81 (1979). Damages flowing from a prosecution that infringes these constitutional rules governing criminal litigation may well be available under section 1983.

For example, the right to a fair trial includes a prosecutor's obligation under the Due Process Clause to learn of and disclose to the defense material exculpatory information known to police and other investigators. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This allocation of responsibility makes good sense; police need not be lawyers, and prosecutors are in a far better position to determine if information is exculpatory and subject to disclosure than police. Still, if police take steps to obstruct prosecutors in discharging this duty, they may be liable in damages for a wrongful prosecution or conviction.[10]

Beyond that, perhaps a failure to timely investigate an arrestee's claim of innocence might violate due process. *Cf. Baker*, 443 U.S. at 145 ("We may even assume mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of

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[10] For cases embracing a rule along these lines, see, for example, *Burke v. McDonald*, 572 F.3d 51, 58 (1st Cir. 2009); *Dominguez v. Hendley*, 545 F.3d 585, 589–90 (7th Cir. 2008); and *Villasana v. Wilhoite*, 368 F.3d 976, 980 (8th Cir. 2004).

time deprive the accused of 'liberty without due process of law.'").

And, perhaps due process requires some civil remedy for an alleged malicious prosecution, *see Albright*, 510 U.S. at 283-86 (Kennedy, J., concurring in the judgment), although, when the prosecution is allegedly a consequence of an arrest without probable cause, the ability of the arrestee to bring a timely Fourth Amendment claim likely provides the process that is constitutionally due. *Cf. Gerstein*, 420 U.S. at 126 n.27 ("The Fourth Amendment has always been thought to define the 'process that is due' for seizures of persons and property in criminal cases, including the detention of suspects pending trial.").

Here, only a Fourth Amendment claim is before the Court. Perhaps the prosecutor was imprudent for pressing charges against petitioner on the basis of the arresting officers' accounts, rather than waiting for laboratory test results, but the prosecutor's decision was his own – not that of the arresting officers – and that decision neither violated the Fourth Amendment nor implicated the interests protected by that amendment.

For his part, petitioner argues that damages liability for wrongful prosecutions will deter police misconduct. Pet. Br. 35. Indeed, damages are available against police for wrongful arrests, if plaintiffs timely sue. Charging decisions, in contrast, are made by prosecutors. Treating police officers as if they were prosecutors "is anomalous," and even "raises serious questions about whether the police officer would be entitled to share the prosecutor's absolute immunity." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

Beyond that, the incentive effects of liability are blunted because police officers are usually indemnified for their legal costs. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912-37 (2014). The ubiquity of indemnification is unsurprising: "[I]ndemnification is the most efficient way for an employer to offer the level of compensation that will minimize the risk of over-deterrence." Rosenthal, *supra* at 131 (footnote omitted). To be sure, local governments have reason to encourage employees to avoid incurring liabilities that for which they must be indemnified. Nevertheless, local governments must also respond to political and not merely economic incentives, and they "likely perceive far more political pressure to make cases than to limit liability"; thus, petitioner's view of the incentive effects of liability "considerably oversimplifies the crosscutting pressures faced by those in law enforcement." *Id.* at 153 (footnote omitted).

Accordingly, damages associated with a criminal prosecution are not recoverable under a constitutional provision that addresses "search and seizure," not malicious prosecution.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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